United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

1-27-77

76-7522

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARGARET TOWNSEND,

Plaintiff-Appellee,

—against—

NASSAU COUNTY MEDICAL CENTER: DOCTOR DONALD H. EISENBERG, SUPERINTENDENT, NASSAU COUNTY CIVIL SERVICE COMMISSION: GABRIEL KOHN, Chairman: EDWARD S. WITANOWSKI, EDWARD A. SIMMONS, ADELE LEONARD, Executive Director of NASSAU COUNTY CIVIL SERVICE COMMISSION; NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; ESRA H. POSTEN, President of the NEW YORK STATE CIVIL SERVICE COMMISSION and head of the NEW YORK STATE CIVIL SERVICE DEPARTMENT,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR NASSAU COUNTY DEFENDANTS-APPELLANTS

WILLIAM GITELMAN
County Attorney of Nassau County
Attorney for
Nassau County Defendants-Appellants
Nassau County Executive Building
Mineola, New York 11501
(516) 535-4406

NATALE C. TEDONE
Senior Deputy County Attorney

WILLIAM S. NORDEN
Deputy County Attorney

TABLE OF CONTENTS

Table of Cases

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARGARET TOWNSEND,

Plaintiff-Appellee,

—against—

NASSAU COUNTY MEDICAL CENTER; DOCTOR DONALD H. EISENBERG, SUPERINTENDENT, NASSAU COUNTY CIVIL SERVICE COMMISSION; GABRIEL KOHN, Chairman; EDWARD S. WITANOWSKI, EDWARD A. SIMMONS, ADELE LEONARD, Executive Director of NASSAU COUNTY CIVIL SERVICE COMMISSION; NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; ESRA H. POSTEN, President of the NEW YORK STATE CIVIL SERVICE COMMISSION and head of the NEW YORK STATE CIVIL SERVICE DEPARTMENT,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR NASSAU COUNTY DEFENDANTS-APPELLANTS

Preliminary Statement

This brief is submitted in reply to the brief for plaintiff-appellee, in order to correct only the major discrepancies and inconsistencies which appear in appellee's brief.

Appellee's Reply to Statement of the Case

At page three of her brief, appellee states that the 1971 competitive examination which appellee was permitted to

take (even though she possessed neither college degree nor ASCP certification), and which she admittedly failed, is not at issue in this case. Appellants contend that the 1971 examination is important to the issues presented for review, in that, first, it shows that appellee was "grandfathered" in her position and could have been placed into a permanent classification had she passed the examination, regardless of whether or not she possessed a college degree. Second, the fact that appellee failed the 1971 examination shows that appellee was permitted to remain as a provisional medical technologist for two years (1971-1973) solely because there were not sufficient names on the eligible list of those who took and passed the examination to fill all available medical technologist I positions at Nassau County Medical Center (hereinafter "NCMC"). This demonstrates that appellee was not demoted due to her race, but rather due to the everyday, internal operation of a large, municipal civil service system that is color-blind, and favors no particular class of persons.

Appellants' statement (Brief for Appellants, p. 4) that appellee was discharged on December 31, 1973 with three white provisional medical technologists (not technologists *I;* appellee's brief, p. 5) is accurate and has basis in the Appendix (A. 86).* In any event, it is obvious that appellee was discharged from her provisional position with at least one white provisional medical technologist for precisely the same reason, i.e. lack of qualification. See *Milson* v. *Leonard,* at pp. 10-11 of appellants' brief.

Reply to Point I of Appellee's Brief

The analogy drawn by appellee (appellee's brief, p. 12) in the instant case to the four-pronged test enunciated in *McDonnell Douglas Corp.* v. *Green,* 41 U.S. 792, 802, 36

* (A. —) refers to page numbers in Joint Appendix.

L. Ed. 2d 668, 677, 93 S. Ct. 1817 (1973), is whimsical and without merit. The only claim appellee can make within the ambit of the test set forth in *McDonnell Douglas, id.,* is that she is a black person. Appellee is not a medical technologist I because she is *not qualified* to be a medical technologist. First, appellee failed the 1971 competitive examination, and second, appellee possesses neither a bachelor of science degree nor ASCP certification. Moreover, appellants employ only those who possess the requisite qualifications, regardless of color, as medical technologists, and have accepted no one with appellee's qualifications.

It is evident that appellee seeks insurance in a position for which she once failed a competitive examination and for which she does not possess the requisite qualifications. However, it is axiomatic that Title VII provides only equal employment opportunity and not assurance of a job for minority members.

Appellee, throughout Point I of her brief, demonstrates basic misunderstanding of civil service in New York State. Appellants are bound by the strictures of the New York State Civil Service Law and the rules and regulations promulgated pursuant thereto. Appellant, Nassau County Civil Service Commission (hereinafter "Commission"), like every other municipal civil service commission in New York State, provides for positions on a graded scale. Ideally, each position on a grade scale corresponds to a specified salary and specified duties which are different from position to position on the grade scale. As one moves up the graded scale from one position to a higher position on the scale, the corresponding prerequisites for qualification to the higher position become more stringent.

There is, however, an occasional overlap of duties between two positions on a grade scale within the same civil service system. This, apparently, is the situation in the

case at bar. Appellants contend that the mere fact that appellee, as a laboratory technician II, performs similar functions as a medical technologist I in the blood bank laboratory at NCMC, is not sufficient, of itself, to warrant intrusion by a federal court into the internal administration of a municipal civil service system. The additional fact that appellee is a member of a minority and has produced statistics which show that a higher percentage of whites possess college degrees than do members of her minority does not warrant federal relief, pursuant to Title VII, that will disrupt the internal administration of a municipal civil service system. Appellants submit that appellee has made no showing whatsoever of discrimination, purposeful or otherwise.

Reply to Point II of Appellee's Brief

Appellee made no attempt to show, through statistics, that there are a disproportionate number of whites employed as medical technologists at NCMA; nor did appellee make any attempt to show that a disproportionate number of white applicants were accepted as medical technologists over actual black applicants for this position.

Appellee's proof of a prima facie case of race discrimination is based, *in toto,* on general statistics (A. 360-364) showing that a disproportionate percentage of whites possess college degrees. These statistics only show that there is a greater pool of *possible or potential* white applicants for the position of medical technologist at NCMC. These general statistics showing educational disparity, without more, have no plausible relationship to actual employment practices of appellants.

"Disproportionate racial impact" requires a showing that the contested employment practice has the actual effect of

excluding a disproportionate number of qualified blacks from employment. The Supreme Court has recently stated in this regard:

> "Respondents, who seek to establish discrimination, have the traditional civil litigation burden of establishing that the acts they complain of constituted discrimination in violation of Title VII. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973). In *Griggs, supra,* the burden placed on the employer 'of showing that any given requirement must have a manifest relationship to the employment in question,' 401 U.S. at 432, did not arise until discriminatory effect has been shown, *Albemarle,* 422 U.S., at 425. *General Electric Company* v. *Gilbert,* —— U.S. ——, 45 L.W. 4031, at 4034, fn. 14 (December 7, 1976).

At the very least, especially in a private, non-class action such as the present case, discriminatory effect is shown by statistical evidence of disparate racial composition of the labor force. *General Electric Co.* v. *Gilbert, id.,* at 4039, fn. 6 (dissenting opn. of Brennan, J.); see as well *Stewart* v. *General Motors Corp.,* 542 F. 2d 445, 450 (7th Cir. 1976). Appellee has made no such showing, and the statistics introduced by appellee at trial (A. 360-365) show only that a higher percentage of whites than blacks possess college degrees. Appellee makes no attempt to connect her purported proof of a prima facie case of race discrimination with the actual employment practices of appellants, or with the racial composition of medical technologists at NCMC.

Appellants' position with regard to the requirement that appellee must prove a prima facie case has been cogently stated as follows:

> "It must be recognized that actual sex (race) discrimination in university employment practices may

> not always be readily discerned. Statistical data will sometimes furnish evidence of disparate treatment of the sexes (races). See *Johnson* v. *University of Pittsburgh*, 359 F. Supp. 1002 (W.D. Pa. 1973). But statistics can be misleading, and a critical analysis of the data will ordinarily be required. Seldom will mechanical application of statistics furnish a basis for a prima facie showing of sex-biased (race-biased) judgments in the decision-making process of faculty promotions and reappointments. Unless the statistics can be properly said to speak for themselves by showing a clear imbalance favoring one sex (race) over the other in the decisions themselves, a plaintiff's burden of establishing a prima facie case of discrimination must be met by othermore significant evidence." (substitutions supplied). *EEOC* v. *Tufts Institute*, 421 F. Supp. 152, 158 (D. Mass. 1975).

See as well, *Gaballah* v. *Roudebush*, 421 F. Supp. 475, 485 (N.D. Ill. 1976).

In the case at bar, appellee, by failing to show, through statistics or any probative evidence, that a disproportionate number of white applicants were selected to medical technologist positions, or that appellants employ a disproportionate number of white medical technologists, has failed to prove a prima facie case of race discrimination. *General Electric Co.* v. *Gilbert, supra; Stewart* v. *General Motors Corp., supra; EEOC* v. *Tufts Institute, supra; Gaballah* v. *Roudebush, supra.*

Reply to Point III of Appellee's Brief

Appellee's contentions that appellants' college degree or ASCP certification requirement is not sufficiently job related to pass Title VII muster, are without merit. Ap-

pellee attempts to show that Title VII requires a one-dimensional analysis of job relatedness, without judicial consideration of the employment system and practice of the employer as an integral whole.

It should be noted at the outset, that the employer's burden of showing job-relatedness does not arise until plaintiff has shown that the employment practice in dispute has a discriminatory effect upon a particular class of persons. *General Electric Co.* v. *Gilbert, supra,* 45LW 4031, at 4034.

A more realistic approach to the job-relatedness rule has recently been expressed in *Woods* v. *Safeway Stores, Inc.*, 420 F. Supp. 35, 42 (E.D. Va. 1976):

> "Of necessity, however, the doctrine's application will vary with (1) the nature of the business involved, (2) the business practice employed, and (3) the degree of the discriminatory impact."

In the case at bar, the nature of the business involved is the running of a large, municipal hospital; the position of medical technologist is a technically skilled job, and "life and death" situations are a daily occurrence. Second, the business practice employed at NCMC is that all applicants for the position of medical technologist must possess a bachelor of science degree or ASCP certification, in addition to passing a competitive examination. Third, the degree of discriminatory impact, if it exists at all in this case, exists only as to the available pool of *possible and not actual* applicants for medical technologist. In any event, plaintiff made no attempt to show whether or not a disproportionate number of blacks are employed as medical technologists at NCMC; or whether appellants hire a disproportionate number of black applicants. Moreover, appellee was permitted to work as a provisional, medical technologist for two years, despite the fact that she pos-

sesses no college degree and failed the 1971 competitive examination. Appellee still works at NCMC as a laboratory technician II.

It is clear beyond cavil that appellee attempts to place a far greater burden of proving job-relatedness upon appellants than is warranted by the foregoing circumstances. The Court below placed the burden upon appellants to prove job-relatedness solely by criterion or predictive validation (A. 303). This is clearly erroneous. Criterion or predictive validation has little value in a small universe, and should be discarded. *Morita* v. *Southern California Permanente Medical Group,* 541 F.2d 217, 220 (9th Cir. 1976); *Jackson* v. *Nassau County Civil Service Commission,* —— F. Supp. ——, Docket No. 74-C-407, E.D.N.Y., October 16, 1976 (Mishler, Ch. J.), slip op. at p. 12. There are only three or four medical technologists in the blood bank laboratory at NCMC (A. 133, 144).

Furthermore, *Washington* v. *Davis,* —— U.S. ——, 48 L. Ed. 2d 597 (1976) clearly allows employers to consider *potential* in applicants who apply for positions of employ. Job-relatedness is no longer limited to actual performance in the ultimate job, and there is no iron-clad method of proving job-relatedness. *Washington* v. *Davis, id.,* 48 L. Ed. 2d at 612, fn. 13 and 613.

It should be noted that appellee's statement at page thirty-nine of appellee's brief that,

> "Testimony and evidence clearly indicated that the nature of the survey was to analyze salaries paid for various jobs in Nassau County and to reclassify jobs where necessary so as to ensure that employees were paid a fair salary commensurate with the nature of the work they were doing (A. 201),"

is incorrect, misleading and has no basis whatsoever in the record. The Cresap, McCormick & Paget study was a comprehensive survey that resulted in a reclassification of positions and new job specifications, not only at NCMC, but in all departments throughout the Nassau County Civil Service (A. 195-199, 201).

Finally, it should be noted that there is no position at NCMC classified as "blood bank technologist" or "medical technologist in blook bank". Applicants for medical technologist positions at NCMC may be assigned for training at any one of the numerous laboratories at NCMC (A. 148, 222). Appellee's only proven skills are in the blood bank laboratory, and the Court below created a special position for appellee within the Nassau County Civil Service. It is respectfully submitted that the Court below was clearly erroneous, and disruption of the Nassau County Civil Service to create a special position for appellee goes far beyond equal employment opportunity and the permissible ambit of Title VII.

CONCLUSION

For the reasons stated above, the Order and Judgment appealed from should be reversed.

Respectfully submitted,

WILLIAM GITELMAN
County Attorney of Nassau County
Attorney for
Nassau County Defendants-Appellants
Nassau County Executive Building
Mineola, New York 11501
(516) 535-4406

NATALE C. TEDONE
Senior Deputy County Attorney

WILLIAM S. NORDEN
Deputy County Attorney

Of Counsel

MATTHEW TEDONE
Law Clerk

On the Brief

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARGARET TOWNSEND,

Plaintiff-Appellee,

against

NASSAU COUNTY MEDICAL CENTER: DOCTOR DONALD H. EISENBERG, SUPERINTENDENT, NASSAU COUNTY CIVIL SERVICE COMMISSION: GABRIEL KOHN, Chairman: EDWARD S. WITANOWSKI, EDWARD A. SIMMONS, ADELE LEONARD, Executive Director of Nassau County Civil Service Commission; NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; ERSA H. POSTEN, President of the New York State Civil Service Commission and head of the NEW YORK STATE CIVIL SERVICE DEPARTMENT,

Defendants-Appellants.

On Appeal From The United States District Court For The Eastern District of New York

---

Affidavit of Service By Mail

STATE OF NEW YORK }
} SS:
COUNTY OF NEW YORK }

LOUIS MARK, being duly sworn, deposes and says: That he is over twenty-one years of age: That on the 28th day of January 1977 he served three copies of the attached Reply Brief For Nassau County Defendants-Appellants, on McEvilly & Kluewer, Attorneys for Plaintiff-Appellee, by enclosing said copies in a fully post-paid wrapper addressed as follows and depositing same in the United States Post Office maintained at [illegible] Canal Street, New York City, New York.

McEvilly & Kluewer, Esqs.
73 Main Street
Hempstead, New York 11550

Louis Mark

Sworn to before me this

28th day of January 1977

[illegible] York

[illegible] 1977

Lee Printing Co., Inc., 451 Greenwich St., N.Y. 10013—966-4300